

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

UNITED STATES OF AMERICA,

Plaintiff

vs.

Case No. 2:09-cr-00023-001 LJM-CMM

JAMES McNEW,

Defendant

REPORT TO DISTRICT JUDGE
PROPOSED FINDINGS OF FACT AND
CONCLUSION OF LAW

A hearing was convened in this matter on August 3, 2012, on a Petition for Warrant or Summons for Offender Under Supervision filed July 26, 2012. The Court granted the petition for a summons and set this matter for hearing on the defendant's alleged violations of the terms and conditions of his sentence while on supervised release. This matter was referred to the Magistrate Judge for hearing pursuant to 18 U.S.C. 3401(i) in an Entry and Order issued by The Hon. Larry J. McKinney, U. S. District Judge, on August 3, 2012.

The Government appeared by Joe Vaughn, Assistant United States Attorney (via telephone); the defendant, James McNew, appeared in person (in custody) and by counsel, Laura Paul.

The Government and defense counsel advised the Court that the parties had reached an agreement on admission of certain violations and a proposed disposition. The Court advised the defendant of his constitutional rights. The defendant reviewed with counsel, in open court, the specific allegations contained in the Petition. The defendant was sworn and admitted allegations

4, 5, and 6 of the Petition; the defendant denied allegations 1, 2 and 3 of the Petition.

Accordingly, the defendant admitted that he had failed to participate in a substance abuse program, failed to report for drug testing as ordered, and twice submitted adulterated urine samples to authorities. The defendant further admitted twice leaving the District without written permission of the Court or the probation officer. The defendant further admitted his failure to provide documentation regarding community service hours completed.

The Court finds that the defendant made a knowing, intelligent and voluntary admission of violations 4, 5, and 6 outlined in the Petition. The Court notes that the defendant previously appeared on a Petition for Warrant or Summons for Offender Under Supervision on August 4, 2010 and February 24, 2011. This Magistrate Judge submitted recommendations to Judge McKinney after both hearings; Judge McKinney rendered Judgments consistent with the Magistrate Judge's recommendation on both occasions.

The parties concurred that a term of seven months imprisonment is appropriate. Supervised release should be revoked and not resumed at the end of the incarceration.

The undersigned recommends to the Court adoption of the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. The defendant, James McNew, was sentenced on November 4, 2008 upon his conviction of Transporting an Undocumented Alien for Private Financial Gain Within the United States by Means of a Motor Vehicle. The original sentence included 15 months confinement and three years of supervised release.

2. While on supervised release, the defendant violated the terms of supervised release as follows:

- a. Defendant failed to report to the Hamilton Center for drug testing on occasions (September 13, 27; November 10, 29; December 6, 19, 20, 29, 2011; February 7, 12, 2012).
 - b. On December 22, 2011 and January 11, 2012, defendant submitted urine samples determined to be invalid because the specimen was not consistent with human urine. He admits submitting an adulterated sample.
 - c. On January 28, 2012 and April 5, 2012, defendant traveled outside the Southern District of Indiana without the permission of the Court or the probation officer.
 - d. Defendant failed to document, or report, his community service work.
3. The defendant was under supervision of the U.S. Probation Office on July 26, 2012, when the Petition was filed.
4. The defendant admitted these allegations, in open court, and after the advice of counsel.
5. The specific allegations violate the terms of supervised release as follows:
- a. Defendant failed to appear/participate in a treatment program for drug addiction as required by the court.
 - b. Defendant submitted adulterated urine samples for testing.
 - c. Defendant traveled outside the judicial district without permission of the court or the probation officer.
 - d. Defendant has failed to document his community service requirement.
6. Defendant acknowledged that he had violated the terms of his supervised release and stated an understanding of the consequences of further violations.

Conclusions of Law

1. The Court finds by a preponderance of the evidence that the defendant violated the terms of supervised release on and after September 13, 2011.

2. The violations noted in the Findings of Fact under Paragraph 5, sub-parts a, b, c and d constitute Grade C violations under §7B1.1(b), *United States Sentencing Guidelines* (Chapter 7, Violations of Probation and Supervised Release).

3. The defendant's criminal history under §7B1.4(a) is Category I.

4. Based upon these conclusions, the sentencing options for this defendant include a range of imprisonment from four to 10 months based upon these findings and conclusions. *See*, §7B1.4(a).

5. Based upon these findings and conclusion, the Magistrate Judge recommends that the defendant's current supervised be revoked and that the defendant be sentenced to a seven-month term of incarceration.

6. In reaching these conclusions, the Court has considered the factors set forth in 18 U.S.C. 3553(a)(1) [nature and circumstances of the offense and the history and characteristics of the defendant, here, the multiple violations of the terms of supervised release and evident illegal drug use], (a)(2)(B) [affording adequate deterrence to criminal conduct, here, consideration of the defendant's multiple violations and disregard of reasonable rules of supervised release, now having appeared before this Court three times for probation violations], (a)(2)(c) [to protect the public from further crimes of the defendant, here, upon evidence of illegal drug use], (a)(2)(D) [to provide the defendant with a structured environment within which to confront drug dependency], (a)(4), (a)(5) [not applicable here], (a)(6) [the need to avoid unwarranted sentence disparities among defendants with similar records], and (a)(7) [not applicable here].

Recommendation

The undersigned recommends to the Court adoption of these Findings of Fact and Conclusions of Law and the revocation of the defendant's supervised release, imposition of term

of incarceration of seven months. Supervised release following incarceration is not recommended.

By agreement of the parties, the defendant is ORDERED detained pending the District Court's consideration of this recommendation.

Dated: 13 August 2012

Respectfully submitted,

Craig M. McKee

Craig M. McKee
United States Magistrate Judge

Distribution to:

Joe Vaughn, U.S. Attorney's Office
Laura Paul
Ryan Sharp, U.S. Probation Office